

**STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

WAWA, INC.¹

Employer

and

Case 4–RC–20847

UNITED FOOD AND COMMERCIAL
WORKERS UNION, AFL-CIO, LOCAL 1360²

Petitioner

**REGIONAL DIRECTOR’S DECISION AND
DIRECTION OF ELECTION**

The Employer, Wawa, Inc., operates approximately 540 retail convenience stores in Pennsylvania, New Jersey, Delaware, Maryland, and Virginia. The Petitioner, UFCW Local 1360, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of employees employed by the Employer at a single store, Store 314, which is located at 123 Whitehorse Pike in Berlin, New Jersey. The Employer contends that this unit is inappropriate and that the smallest appropriate unit would encompass all employees in the Employer’s Area 2, which comprises 88 stores. Alternatively, the Employer contends that the 13 stores in a group supervised by a Store Supervisor Stacey Farreny, including Store 314, would be an appropriate unit. The Petitioner’s proposed unit would consist of about 15 employees, while the Employer’s proposed Area-wide unit would include approximately 2400 employees.³ The parties additionally disagree as to the status of the Assistant Manager (AM). The Employer contends that the AM is appropriately included in the unit, while the Petitioner would exclude the AM as a supervisor within the meaning of Section 2(11) of the Act.

The parties agree that the following classifications of employees are appropriately included in the bargaining unit: Customer Service Leaders (CSLs), Customer Service Associates (CSAs), Food Service Leaders (FSLs), Food Service Associates, Fuel Team Leaders, Fuel Team Associates, Facility Maintenance Leaders, Facility Maintenance Associates, Shift Leaders, Coffee Hosts/Hostesses, and Apprentices. The parties also agree that Store Managers are supervisors within the meaning of Section 2(11) of the Act and that Managers-in-Training (MITs) do not share a community of interest with employees in the bargaining unit and should be excluded from the unit.

¹ The Employer’s name appears as amended at the hearing.

² The Petitioner’s name appears as amended at the hearing.

³ The record does not indicate how many employees are in the Supervisory Group unit.

A hearing officer of the Board held a hearing, and the parties filed briefs.⁴ I have considered the evidence and the arguments presented by the parties concerning the appropriateness of the petitioned-for unit and the issue of whether the Assistant Managers are supervisors. As discussed below, I have concluded that the presumption favoring a single location unit has been overcome and that the smallest appropriate unit is a unit of employees employed in the Supervisory Group headed by Stacey Farreny.⁵ I have further concluded that the AMs are not supervisors within the meaning of Section 2(11) of the Act and should be included in the unit.

To provide a context for my discussion concerning the issues described above, I will first present an overview of the Employer's operations. Then, I will review the factors that must be evaluated in determining whether a single retail store unit is appropriate for the purposes of collective bargaining. I will next present in detail the facts and reasoning that support my conclusion that the petitioned-for unit is inappropriate. Thereafter, I will review the factors to be evaluated in determining whether the AM is a supervisor and present the Petitioner's contentions, the facts, and my reasoning as to that issue.

I. OVERVIEW OF OPERATIONS

The Employer's Organizational Structure

The Employer's convenience stores are divided operationally into three Regions: the New Jersey Region; the Keystone Region, which includes the Pennsylvania stores; and the Cape Atlantic Region, which includes the Delaware, Maryland, and Virginia stores. The majority of stores are located in central and southern New Jersey and eastern Pennsylvania. The Employer also maintains a dairy operation with warehouse and distribution facilities.

⁴ Counsel for the Employer has filed a Motion to Strike Brief of Petitioner, contending that the Petitioner's brief was not timely served on the Employer. In this regard, the Employer contends that the Petitioner's brief was hand-delivered to the Regional Office on the due date, but the Employer was not notified of this hand-delivery by telephone as required by Section 102.114 of the Board's Rules and Regulations. The Petitioner filed an opposition, and both parties filed additional responses.

Sec. 102.114 of the Board's Rules provides that, in the event of a party's failure to comply with the service requirement, the Board may reject the document. It does not require the document's rejection, and the Board generally will not reject an improperly served document absent a showing of prejudice to a party. *Century Parking*, 327 NLRB 21 fn. 7 (1998), citing *M.K. Morse Co.*, 302 NLRB 924 fn. 1 (1991); *U.S. Postal Service*, 239 NLRB 97, 98 fn. 2 (1978). In this case, I find that the Employer was not prejudiced, as matters raised in the briefs were fully litigated at the hearing, where the Employer had an opportunity to present evidence, cross-examine the Petitioner's witnesses, and present arguments in support of its position. See *Medtrans*, 326 NLRB 925 fn. 2 (1998). Inasmuch as the Employer has failed to show prejudice, its Motion to Strike is denied.

The Employer also filed a Motion to Correct Transcript. The Petitioner did not oppose this Motion, and it is hereby granted.

⁵ At the hearing, the Petitioner indicated that it would not proceed to an election in an Area-wide unit, but it did not indicate whether it would proceed in a Supervisory Group unit.

The Employer's corporate headquarters, known as Red Roof, is located in a suburb of Philadelphia. All operations and personnel are managed and coordinated at the corporate level. The Employer's Human Resources (HR) Department, which it calls the "People Team," is located at Red Roof. Carol Jenson is the Chief People Officer. Several managers report to her, including Ed Iames, Director of People Development.

Each Region is supervised by a Regional Manager. Within each Region, operations are subdivided further into Areas. The New Jersey Region comprises 240 stores and is divided operationally into Areas 1, 2 and 4.⁶ Areas 5, 6, and 7 are located in Pennsylvania, Area 8 covers Delaware and Maryland, and Area 9 covers Virginia.

There is also an HR Manager for each Region. The HR Manager for the New Jersey Region is Dave Szumski, whose office is located at the Employer's Regional Headquarters in Springfield, New Jersey. He personally visits each of the 240 stores once or twice a year. Szumski's staff includes a Recruiting Supervisor, Regional Recruiters, an Associate Relations Specialist, a Training Supervisor, a Training Specialist, and Trainers.

An Area Manager is in charge of each Area. The Area Manager is responsible for operations, finances, budgeting, and store maintenance, as well as coordination with corporate headquarters for operations, payroll, marketing, training, and employee development.

William Burt is the Area Manager for Area 2. Burt works at the Regional Headquarters in Springfield. He is responsible for 88 stores in a 50-mile area in north and central New Jersey.⁷ These stores are divided into seven groups of about 11 to 13 stores, which are headed by Store Supervisors (herein called Supervisory Groups). Store Supervisors are responsible for store profitability, management of resources among stores, employee development and training, store maintenance, and inventory shrinkage.⁸

In Area 2, Stacey Farreny is the Store Supervisor for 13 stores located in Burlington and Camden Counties, including Store 314. The stores in Farreny's Supervisory Group are very closely grouped; they are all located within three or four miles of each other. Some stores in the neighboring Supervisory Groups are also located within a mile of stores in Farreny's group.

The boundaries drawn to identify Areas and Supervisory Groups are realigned every two or three years. During the realignment in January 2004, Area 2 gained some stores from the former Area 3, and Store Supervisor Farreny gained and lost some stores in her Supervisory Group.

The Employer's stores differ in size, layout, and employee complement, and each store is considered a separate "profit center." All of the stores provide food services and sell the same selection of products, including Wawa-brand coffee and dairy products. Newer stores, which

⁶ Area 3 was eliminated and its stores absorbed into neighboring Areas as part of a corporate realignment in January 2004.

⁷ In Area 2, three new stores opened within the past year. One store closed, and another store closed and was rebuilt at a new location.

⁸ Inventory shrinkage refers to pilferage, spoilage, or other unaccounted-for losses of product.

often have gasoline fuel courts, are generally larger in size. Most stores are open 24 hours a day, although in Area 2 five stores are open 18 hours per day.

Employee Duties and Responsibilities

Generally, each store has a Store Manager, one or two AMs, two to eight CSLs, one or two FSLs, 10 to 40 CSAs, and two Apprentices. A Manager-in-Training (MIT) may also be assigned to work temporarily in a store. Facility Maintenance Leaders, Fuel Team Leaders, and Fuel Team Associates are employed only at stores with fuel courts. This Decision will collectively refer to CSLs, FSLs, Shift Leaders, Fuel Team Leaders, and Facility Maintenance Leaders as “Leaders.”

At Store 314, the Employer employs the Store Manager, two AMs, one FSL, 10 or 11 CSAs, and one Apprentice, for a total of about 14 or 15 employees. There are no MITs, Shift Leaders, or Coffee Host/Hostesses assigned to this store. As there is no fuel court, Store 314 employs no fuel service employees.

A Store Manager heads each store. The employee complement varies depending on store sales volume and whether the store has a fuel court, but in general stores employ a range of 15 to 50 full-time and part-time employees. For stores with a fuel court, about half of the employees provide fuel services. In New Jersey, approximately half of the stores have a fuel court, but in Farreny’s Supervisory Group, only one store has a fuel court, and Store 314 does not have one.

The Assistant Manager is a full-time hourly position that reports to the Store Supervisor but is supervised on a daily basis by the Store Manager. The AM spends about 80 to 90 percent of his or her time performing customer service duties on the floor but is expected to be familiar with all store operations. The AM directs CSAs, orders products, and develops projects with the Store Manager, including employee retention and training programs.⁹

The Manager-in-Training, a full-time hourly position, also reports to the Store Supervisor but is supervised on a daily basis by the Store Manager. MITs spend one to three years in training, which may be conducted by the Store Supervisor, Store Manager, or an experienced Leader. Upon successful completion of training, MITs are promoted to Store Manager positions.

The Food Service Leader is a full-time hourly position. The FSL ensures that food production and distribution programs at the store level are executed, including planning menus, ordering, displaying, and storing products, and overseeing CSAs assigned to food service.

The Customer Services Leader performs duties similar to those of the FSLs but may also operate cash registers, stock shelves outside the food service area, manage cash, receive product deliveries, and perform other duties assigned by the Store Manager.

The Customer Service Associate, a part-time hourly employee, is assigned to cash register operation, food preparation, cleaning, housekeeping, and stocking duties. Apprentices, who are CSAs under the age of 18, perform work similar to CSAs.

⁹ This Decision sets forth additional facts concerning the AMs’ duties and responsibilities below in connection with the discussion of their supervisory status.

With respect to job classifications that are not present at Store 314, the Shift Leader is responsible for handling cash in the store during the shift. The Coffee Host/Hostess maintains, stocks, and cleans the coffee area. Facility Maintenance Leaders provide custodial and maintenance services, primarily for stores with fuel courts. They remove trash, sweep parking lots, clean windows, mop floors, and service bathrooms. The Facility Maintenance Associate, a part-time hourly custodial position, is responsible for maintenance, cleaning, inspection, and maintenance of fuel equipment, and stocking product as needed. The Fuel Team Leaders spend the majority of their time pumping gas and are responsible for ensuring safety, cleanliness, and customer service at the fuel court. The Fuel Team Associate is responsible for pumping gas, cleaning and supplying the fuel court, and assisting customers as needed.

II. FACTORS RELEVANT TO DETERMINING THE APPROPRIATENESS OF THE UNIT

The Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the petitioned-for unit. If that unit is appropriate, then the inquiry ends. *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative unit proposals of the parties. See, e.g., *Bartlett Collins Co.*, 334 NLRB 484 (2001); *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000). The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications. See, e.g., *R & D Trucking, Inc.*, 327 NLRB 531 (1999); *State Farm Mutual Automobile Insurance Co.*, 163 NLRB 677 (1967), *enfd.* 411 F.2d 356 (7th Cir. 1969). It is well settled that the unit need only be *an* appropriate unit, not the most appropriate unit. *Morand Brothers Beverage Co.*, 91 NLRB 409, 419 (1950), *enfd.* on other grounds, 190 F.2d 576 (7th Cir. 1951).

Ordinarily when considering a multi-facility operation, the Board holds that a single-location unit is presumptively appropriate for collective bargaining. *Trane, an Operating Unit of American Standard Cos.*, 339 NLRB No. 106 (2003); *J&L Plate, Inc.*, 310 NLRB 429 (1993). However, the presumption is rebuttable. In ascertaining whether there is enough evidence to overcome the presumption, the Board evaluates whether the employees at the respective facilities possess a sufficient community of interest to warrant their inclusion in a single bargaining unit by considering the following criteria: (1) similarity in employee skills, duties, and working conditions; (2) centralized control of management and supervision; (3) employee contact and interchange and functional integration; (4) geographical separation of facilities; and (5) bargaining history. *Budget Rent-A-Car Systems, Inc.*, 337 NLRB 884, 885 (2002); *Bashas', Inc.*, 337 NLRB 710, 711 (2002); *Alamo Rent-A-Car*, 330 NLRB 897 (2000); *Macy's West, Inc.*, 327 NLRB 1222, 1223 (1999).

Single-store units are presumptively appropriate in the retail industry. *J&L Plate, Inc.*, *supra*; *Haag Drug Co.*, 169 NLRB 877 (1968). This presumption may be rebutted where the day-to-day interests of employees in a store have effectively merged with employees of other stores. *Food Marts, Inc.*, 200 NLRB 18 (1972). In rebutting the presumption, the Board does not require a party to proffer "overwhelming evidence . . . illustrating the complete submersion

of the interests of employees at ‘the single store,’ nor is it necessary to show that ‘the separate interest’ of the employees sought have been ‘obliterated.’” *V.I.M. Jeans*, 271 NLRB 1408, 1409 (1984); *Big Y Foods, Inc.*, 238 NLRB 860, 861 fn. 4 (1978).

III. FACTS

A. Administration and Personnel Policies

At the Red Roof corporate headquarters, the Employer establishes product selections, advertising, pricing, and new product “roll-outs,” to be implemented uniformly in all of its retail stores. The Employer negotiates all vendor and distribution contracts at the corporate level, and its legal and real estate departments and corporate website are all based at Red Roof. Repairs to store equipment and premises are centrally coordinated through the corporate Facility Maintenance Department, which provides repair crews or subcontracts the work to local vendors.

All personnel policies are established at the corporate level in the HR Department, including hiring, training, compensation, grievance procedure, discipline, vacation, and paid-time-off policies. A call-in center is maintained for employees for enrollment for health and welfare benefits. All of the Employer’s employees are subject to a dress code and wear the same uniforms, which are differentiated in design according to job classification. All employees also receive the same handbook. The Employer maintains all personnel files at corporate headquarters, and payroll record-keeping and distribution are processed through a computer network that interfaces with electronic time clocks at every store. The ideal complement of full-time Leaders for each store is established at the corporate level through a computerized process called “store portfolio management,” which takes into account store size, volume of sales, customer count, and other factors. A computerized labor scheduler program is used to establish the ideal number of labor hours for each store, and the store is then staffed with a mix of full-time and part-time employees, based on the projections of the store portfolio management program for Leaders. The Store Supervisor, working with HR field representatives, establishes initial staffing for new stores.

Job classifications and job descriptions are all determined at a corporate level. The Employer employs full-time salaried and full-time and part-time hourly employees. The designation of full-time or part-time status does not correspond to the number of hours the employee works, but indicates the employee’s level in the organization, responsibilities, and benefits.

The Store Managers are salaried full-time employees. MITs, AMs, and Leaders are full-time hourly positions. CSAs are part-time employees.

B. Employee Skills and Terms and Conditions of Employment

Skills

Employee skills and duties are differentiated by classification but are similar at all stores. Employees generally start working for the Employer as part-time CSAs, and as they are

promoted into full-time Leader positions they receive additional training as specialists in customer service, food service, fuel service, and facilities maintenance.

Working Conditions, Hours, and Compensation

Employee working conditions are uniform throughout the stores. Employees are all paid based on salary ranges set by corporate headquarters. The Employer differentiates benefits packages on the basis of full-time or part-time status; however, within those groupings all employees receive the same benefits. All employees punch time clocks at the stores where they are employed, wear similar uniforms, and receive similar training depending on their level in the organization.

Store Managers and AMs generally work 45 to 55 hours per week, while CSLs are scheduled for 35 to 40 hours per week. Part-time employees work flexible shifts ranging from five to 50 hours per week. Coffee Hosts/Hostesses usually work about four hours in the mornings. Apprentices are limited to 40 hours of work per week. All hourly employees, whether full-time or part-time, receive time-and-a-half pay after 40 hours of work. All hourly employees except AMs and MITs receive time-and-a-half for working on holidays and double time for Christmas. There is also a 50-cent premium for hourly employees working the midnight shift.

Hourly wage rates for full-time hourly employees range from \$7.50 to \$10.50 for CSLs, \$8.55 to \$12.50 for AMs, and \$10 to \$15 for MITs. These employees typically receive annual step increases on their anniversary dates. Wage rates for part-time CSAs range from \$6 to \$9.75.¹⁰ All CSAs typically receive an automatic wage increase every 90 days for the first year and annually thereafter.

Store Manager salaries are based on store size and range from \$750 to \$1065 per week, including bonuses. The average annual salary for the Store Managers is \$58,000. The average base salary for AMs is about \$600 per week, and including bonuses, their average annual salary is \$33,000.

All employees above age 21, whether full-time or part-time, are eligible to participate in the Employer's Employee Stock Ownership Plan (ESOP) and Savings and Profit-Sharing Plan after 1000 hours in a year of employment. All employees are eligible to participate in the Employee Assistance Program, which is provided to the Employer through a third-party vendor, and an employee credit union. Full-time employees, whether hourly or salaried, are eligible for health, dental, and life insurance, and long-term and short-term disability coverage. Full-time employees earn vacation based on years of service. Part-time employees are eligible for tuition and health care reimbursement programs and earn paid time off after a year of service, based on the number of hours worked.

Employees are often promoted from within the organization. About 70 percent of full-time Leaders are drawn from the ranks of part-time CSAs, and about 50 percent of AMs

¹⁰ The starting rates for "flex stores" are higher, starting at \$7.25 per hour. Flex stores are considered traditionally more difficult to staff than other stores. About 25 percent of the stores in Area 2 are flex stores.

previously served as Leaders. The normal route for promotions in management is from AM to MIT to Store Manager. About 60 percent of MITs are promoted from within the organization, and the remainder are new hires.

Any employee may file a grievance. According to Regional HR Manager Szumski's testimony, Step 1 of the grievance procedure is at the Store Supervisor level, Step 2 involves an appeal to the Area Manager, Step 3 is at the Regional Manager level, and Step 4 involves a panel of corporate vice presidents.¹¹ About 30 percent of grievances were filed over discharges, and the remainder involved lesser levels of discipline. During the year preceding the hearing, about 20 grievances in Area 2 were filed at Step 1, seven grievances were processed to Step 2, the Regional Manager addressed three grievances, and one grievance was addressed at the corporate level. Area Manager Burt testified that he overturned three of the seven disciplinary decisions with which he was involved.

Training

New Jersey HR Manager Szumski oversees six training centers in the state. A facility in Marlton, New Jersey is used to recruit and interview applicants and for new employee orientation. Training and orientation also take place at the Springfield, New Jersey Regional Headquarters.

The HR Department creates a variety of training materials, which are used uniformly throughout the company, including videos, CD-ROMs, and written materials. Orientation occurs at training centers in groups of two to 15 employees. It consists of four to six hours of video and lectures, and a review of company operations, policies, and procedures. Every new employee receives a copy of the handbook and Szumski's telephone number.

Employees receive in-store training after they complete orientation. The Store Manager is responsible for ensuring the training of all full-time and part-time employees at the store and may assign the AM or other employees to assist in this process. The three-day training of part-time employees includes the orientation and instruction in food service and cash register skills. In-store training includes a walk-through with the Store Manager, safety orientation, and then rotation through the various work areas in the store. Employees are expected to complete computer-training modules using a computer located in the Store Manager's office. The Store Manager is responsible for assigning new employees to more experienced employees for training and development.

Certain stores are designated as training locations for new managers. For all lead and managerial positions, the Employer has a four-week business basics training curriculum. Generally, employees attend this program for up to two days per week and spend the remaining time working at their home stores. The training covers such matters as cash procedure, paperwork, food service, inventory, management, and ordering. The Employer provides additional training workshops in inventory shrinkage, interviewing skills, and food service

¹¹ This testimony, however, is at odds with the handbook which identifies the employee's "immediate supervisor" as the responsible party for a grievance at Step 1; the "supervisor's supervisor" as the responsible party for Step 2; the Area Manager for Step 3; and the Grievance Committee for Step 4.

sanitation, among other things. For AMs, required training includes time management and inventory management.

C. Authority of the Area Manager, Store Supervisor, and Store Manager

General Areas of Authority

Area Manager Burt communicates with Store Supervisors daily by e-mail and several times a week by telephone. He holds monthly meetings at the Springfield Regional Headquarters with the seven Store Supervisors in his area, along with Recruiters and HR Specialists. Burt holds four budget meetings with the Store Supervisors from August to December, in addition to quarterly working meetings. He also tours each store quarterly with the Store Supervisors and meets with them individually each week. Burt conducts eight to 10 full-day meetings annually for all Store Supervisors and Store Managers in Area 2, covering such topics as new products, training, and HR programs. He holds occasional meetings with groups of Store Managers and conducts an annual meeting for AMs and Store Supervisors, along with representatives from the HR and Benefits Departments. Bi-annually all AMs, Store Supervisors, and Store Managers attend a convention trade show where the Employer rolls out new products and discusses its five-year plan.

Store Supervisors do not have their own offices but work in the field visiting the different stores, although the record does not indicate the frequency of these visits. Store Supervisors have the authority to hire Store Managers, in consultation with the Area Manager. They may not create any full-time positions, because the store's computer software determines full-time employee complements. Store Supervisors are responsible for promotions and permanent transfers within their Groups, but they need approval from the Area Manager to transfer a Store Manager to a new location, or to promote an AM to an MIT position or an MIT to Store Manager. Store Supervisors meet monthly with the Store Managers in their Supervisory Groups.

Store Supervisors and Store Managers arrange annual multi-store meetings for all part-time employees. These meetings are coordinated and scheduled by the Store Supervisor. Store Managers may initiate their own multi-store meetings for special work projects, such as charity events. Pursuant to Area 2 or supervisory guidelines, Store Managers may be required to work certain shifts or to rotate through shifts at their stores.

Store Operations and Employee Complement

The Store Managers are in charge of day-to-day operations. They are responsible for profitability, inventory, ordering stock, program compliance, cleanliness, and minimization of shrinkage. The Store Manager can request a regular maintenance schedule from the corporate Facility Maintenance Department and may also call in special requests for repairs with the approval of the Store Supervisor. The Store Supervisor or Area Manager may also be involved in requesting regular or emergency maintenance. Store Managers have authority to change the product mix to account for the season and sales volume, but they generally do no more than ensure that stock is replaced as it is sold. They do not have authority to eliminate products or to change prices but may post a "Manager's Special" to reduce spoilage. The Store Manager is responsible for generating reports to Store Supervisors on matters including inventory, shrinkage, safety, and profitability. For stores open fewer than 24 hours a day, the Store

Manager bears the responsibility for opening and closing the store. The Store Manager has no authority to change the store's hours.

While a store's employee complement is determined by the Employer's portfolio management model, a Store Manager may recommend additional hiring to a Store Supervisor if the staffing model is inadequate to meet store needs. The Store Manager has discretion to determine the number of part-time employees needed to fill the staffing projections of the labor scheduler model. With the approval of the Store Supervisor, a Store Manager may hire additional part-time CSAs to fill vacant full-time positions or may temporarily increase the hours of the store's CSAs.

Hiring, Promotions, and Training

The Store Manager is responsible for recruiting full-time and part-time staff. He or she may attend job fairs with representatives of the HR Department, post vacancy signs, place advertisements, and recruit at local schools to find new candidates. An applicant may apply for a full-time or part-time position at a store. Store Managers accept applications for both part-time and full-time positions, but applications for full-time positions are referred to the Store Supervisor or a Regional Recruiter. The Store Manager has full authority for hiring the part-time employees although the Store Supervisor may assist in the interviewing process.¹² Conversely, the Store Supervisor has responsibility for hiring and interviewing full-time employees, but the Store Manager typically will consult with the Store Supervisor on these matters and may assist in recommending and screening applicants. Store Managers' recommendations are usually followed. Store Supervisors must approve the rehire of any part-time employee previously employed by the Employer, and Area Managers must approve the rehire of any previously employed full-time employee.

The Store Manager has discretion to select starting hourly rates for new employees within the established corporate guidelines. Wage increases are automatic and are established at the corporate level. The Store Manager has no input into recommending wage increases.

The Store Manager may recommend hourly employees for promotion to full-time Leader positions or may recommend that a Leader be promoted to AM, and those recommendations will generally be followed. However, final authority for promotions rests with the Store Supervisor and Area Manager.

As discussed above, the Store Manager is responsible for all training in the store for part-time and full-time employees. Additionally, the Store Manager, in consultation with the Store Supervisor, is responsible for providing training to MITs.

Work Schedules, Evaluations, Discipline, and Transfers

The Area Manager, Store Supervisor, and Store Manager ensure adequate staffing in the stores. The Store Manager plans and prepares the work schedules for employees and has the authority to grant and schedule time off. The Store Manager may discuss the schedule with the

¹² Former Store Manager Melissa Klimkofski testified that she hired one part-time employee during her one-year tenure at Store 314.

Store Supervisor, but the Store Manager has full authority to set the schedule without such consultation. If an employee needs time off, the employee will ask the Store Manager and/or prepare a request to be entered into the labor scheduler computer program. The labor scheduler will then prepare a schedule taking into account all employees' requests for time off. However, the Store Manager bears the final responsibility for scheduling. The Store Manager may resolve conflicts in schedules and make changes to the computer-generated schedule, depending on the needs of the store, and may call off-duty employees at home or contact other stores to arrange for a temporary transfer to ensure full staffing. The Store Manager is also responsible for reviewing and correcting if necessary the weekly timecard computer report showing employee hours.

The Store Manager oversees employee performance and is expected to present constant feedback to employees. In this capacity, he or she is responsible for observing employee attitude, work ethic, reliability, and initiative and evaluating part-time employees. The Store Supervisor is in charge of evaluating Leaders, although in practice the Store Manager prepares the evaluations and the Store Supervisor reviews them. The Store Manager keeps records of employee training and skill levels.

The company handbook spells out the Employer's disciplinary procedures and sets forth a progressive discipline system of counseling, written warning, suspension, and termination. The handbook identifies 36 infractions that may result in discipline short of discharge and 16 infractions that may result in immediate discharge.

The Store Manager may not suspend or terminate a full-time employee without approval of the Store Supervisor, and the Store Supervisor is responsible for investigating any recommendation for discipline of a full-time employee. Area 2 Manager Burt is also involved in discussions for all discipline of full-time employees. Store Managers' recommendations as to discipline for full-time employees generally will be followed. A Store Manager has the authority independently to discipline a full-time employee with a written warning for minor infractions or to send a full-time employee home for a major violation of company policy, but they generally will first consult with a Store Supervisor.

A Store Manager has the authority to terminate a part-time employee without approval for conduct involving the 16 infractions identified in the employee handbook, but the Store Manager generally consults with the Store Supervisor or an HR representative prior to taking such action. Former Store Manager Klimkowski testified that she discharged four employees during her one-year tenure, but she did not explain the circumstances of these discharges.

The Store Manager has no authority to transfer an employee permanently. The Store Supervisor is responsible for all permanent transfers and will usually make arrangements for temporary transfers.

D. Employee Contact and Interchange and Functional Integration

The Employer's Transfer Policies

The Employer will only require transfers for high-level employees such as Store Managers, MITs, and AMs; for all other full-time employees and all part-time employees, temporary and permanent transfers are voluntary. Employees often transfer voluntarily because

they are seeking additional work hours, and these temporary transfers may last from a few hours to several weeks. Employees also may be transferred on a temporary basis to cover for insufficient staffing at other stores due to employee absences, new store openings, to assist with special projects, or for training and development purposes. When an employee is temporarily transferred to another store, his or her pay will be charged to the “home” store. Store Managers may arrange for temporary transfers from other stores to cover staffing needs. Transfers generally take place within a Supervisory Group or within an Area.

Permanent transfers typically occur because of employee changes in residence, promotions, or to staff new stores with experienced employees. Only Store Supervisors have the authority to transfer employees permanently, and they usually make arrangements for temporary transfers by contacting the other stores in their Supervisory Groups. A Store Supervisor may require permanent transfers of Store Managers, MITs, and AMs with the approval of the Area Manager, but they may require temporary transfers of these employees without seeking approval.

Records of Temporary Transfers

The Employer submitted exhibits showing the extent of temporary employee transfers between different stores for the period January 1, 2003 through June 1, 2004 (about 74 weeks). The exhibits show that there were 25 occasions in which employees based at other stores worked at Store 314 (147 hours) and 82 occasions in which employees based at Store 314 worked at other stores (600 hours) for a total of 107 temporary transfers to and from Store 314 (747 hours).¹³ During this same time period, 37 employees were based at various times in Store 314, about 15 at a time, and 51 employees worked at Store 314 at some point. Thus, 14 employees temporarily transferred to Store 314.¹⁴

The Employer also submitted exhibits showing the extent of interchange involving Farreny’s entire Supervisory Group. The exhibits show that there were 1248 occasions (12,575 hours) in which employees temporarily transferred to stores in Farreny’s Supervisory Group, and 1183 occasions (9686 hours) in which employees in this Group temporarily transferred to other stores, for a total of 2431 temporary transfers to and from stores in Farreny’s Supervisory Group (22,261 hours).¹⁵ 810 employees were based at stores in this Group during this period, and 1126 employees worked at Farreny’s Supervisory Group at some point. Thus, 316 employees temporarily transferred to Farreny’s Supervisory Group.¹⁶

¹³ Thus, the average number of temporary transfers was 1.4 per week or 6.3 per month.

These numbers are based on the Employer’s Exhibit 19. The Employer had previously submitted a series of exhibits purporting to show the extent of temporary transfers, but testimony revealed that they were inaccurate in several respects. Among other problems, the exhibits counted as temporary transfers: transfers involving non-unit employees such as MITs; dates on which employees did not have hours recorded; permanent transfers; and vacations, bonuses and meetings. Some of the exhibits also counted a single shift that spanned two days as two separate transfers. Exhibit 19 corrected most of these problems. The exhibit does not account, however, for the fact that the borders of the Supervisory Group were realigned in early 2004.

¹⁴ Obviously, some employees based at other stores worked at Store 314 more than once.

¹⁵ This averages out to 2.5 temporary transfers per week or 11 per month per store.

¹⁶ The Employer submitted three exhibits that differ as to which stores are in Farreny’s Supervisory Group. Exhibit 22 lists 13 stores, Exhibit 7(a) lists 14 stores, and Exhibit 12 lists 15 stores. The numbers

The exhibits further show that during this same time period, there were 9148 occasions (85,338 hours) in which employees from other stores temporarily transferred into Area 2 stores and 8123 occasions (80,855 hours) in which employees based in Area 2 stores transferred out to other stores for a total of 17,271 temporary transfers.¹⁷ 5896 employees were based in the 88 stores in Area 2, and 7912 employees worked at stores, including their home store and other stores, in Area 2 at some point. Thus, 2016 employees temporarily transferred in Area 2.

Records of Permanent Transfers

The Employer also introduced exhibits that show permanent transfers for Store 314, for the 13 stores in Farreny's Supervisory Group, and for the 88 stores in Area 2. These exhibits show that during the 17-month period from January 1, 2003 to June 1, 2004, there were six permanent transfers involving employees of Store 314, and all but one of these transfers were to or from other stores in Farreny's group.¹⁸ During this period, there were 222 transfers involving employees in Farreny's Supervisory Group. 210, or 95 percent, of these transfers were to other stores within the Supervisory Group. There were also 897 permanent transfers involving employees in Area 2. 830, or 93 percent, of these permanent transfers were from one Area 2 store to another Area 2 store.

Testimony Concerning Transfers

Witness estimates of the amounts and percentages of time that employees have been temporarily transferred varied widely. Area Manager Burt estimated that in a given week an employee transfers in or out of about 25 percent of the stores.¹⁹ Director of People Development Edward James, who has been employed by the Employer in various capacities for approximately 14 years, testified that temporary transfers were "very frequent." In contrast, former Store Manager Klimkofski testified that in her experience, temporary transfers occurred only about once every other month.

Regional HR Manager Dave Szumski, a long-time employee of the Employer who has held managerial positions for the past 12 years, testified that while he was employed as a CSA and an AM, he was sometimes requested by his Store Manager to work at stores that needed coverage, usually for a day at a time, and he was permitted to refuse these requests. He worked at the other stores in addition to his regular schedule. Carolyn Coneys, Manager of the HR Service Center, testified that during the time that she was employed as a payroll specialist, she also worked extra hours as a CSA in several stores, at the request of a Store Supervisor.

set forth above are based on the stores listed in Exhibit 22, because testimony indicated that there were 13 stores in the Group.

¹⁷ The average was 2.6 per temporary transfers per week or 11.5 per month.

¹⁸ An exhibit submitted by the Employer shows nine permanent transfers involving Store 314; however, three of the transfers involved Store Managers, a non-unit position. Another exhibit shows seven permanent transfers from Store 314 during the 17-month period, all to stores in Area 2.

¹⁹ As an example, Burt testified that one employee requested to and was permitted to transfer between a store located near his home during the summer months and a store located near his school during the winter months.

E. Geographical Proximity

As noted above, the 88 stores in Area 2 span 50 miles in north and central New Jersey. Distances between stores within the seven Supervisory Groups in Area 2 range from a few blocks to three or four miles; on average all stores in a group are located within a two to three miles radius. Distances between Supervisory Groups range from less than a mile to as many as 15 to 20 miles.

The stores in Farreny's group are all located within a radius of about three or four miles. Some stores in neighboring Supervisory Groups are located within a mile of stores in Farreny's group.

F. Bargaining History

There is no bargaining history for any of the employees in the petitioned-for unit.

IV. ANALYSIS OF UNIT ISSUE

I find that the Petitioner's proposed unit is inappropriate. Rather, the record demonstrates that the smallest appropriate unit for collective bargaining is the Supervisory Group supervised by Store Supervisor Stacey Farreny.

The Employer's operations are administratively centralized and highly integrated. Regional Operations Managers and HR Managers ensure that company policies and procedures are implemented throughout the organization. At the Red Roof corporate facility, the Employer maintains centralized control over all operations, including purchasing, accounting, advertising, pricing, security, vendor contracting, and product distribution. Significantly, the Employer also maintains centralized control over personnel matters and uniformly applies labor relations policies to all employees, including recruiting, hiring, compensation, training, time off, and uniforms. At corporate headquarters, the Employer develops the employee handbook, job descriptions, training materials, hiring guidelines, and interview packets. Employees at all stores have essentially the same job skills, functions, and classifications and work under identical terms and conditions of employment.

Store operations are closely overseen by the Regional Managers, Area Managers, and Store Supervisors. In particular, the record establishes that Store Supervisors have significant responsibility for day-to-day decisions regarding labor relations matters for the stores within their Supervisory Groups and severely circumscribe the autonomy of Store Managers. Store Supervisors regularly visit the stores within their groups and meet regularly with the Store Managers and review their reports. They are routinely involved in hiring decisions for employees in the stores within their groups. Thus, they personally make hiring decisions concerning all full-time employees and may participate in interviews with applicants for part-time positions. Similarly, they determine whether to impose discipline and discharge for full-time employees and are regularly consulted regarding discipline or discharge for part-time employees. Store Supervisors are responsible for all permanent transfers within their Groups and are often involved in arranging temporary transfers to ensure that stores are properly staffed.

They also determine employee promotions in consultation with the HR Department. Significantly, AMs and MITs report directly to the Store Supervisors. Although the Store Manager may set the wage rate for new part-time employees, the Store Supervisor must approve any deviation from corporate guidelines. See *V.I.M. Jeans*, 271 NLRB at 1409.

Store Managers help recruit new employees, direct and assign work, schedule shifts and hours, approve leave requests, discipline, discharge and set initial wages for part-time employees, and recommend promotions. However, many of these decisions are made in consultation with higher-level management and are to a great extent dictated by the Employer's centralized policies rather than the Store Manager's discretion. In particular, they must set wages within the corporate framework, are heavily guided by computerized programs in setting schedules, and routinely consult with Store Supervisors in making disciplinary decisions. Moreover, they have very limited authority over full-time employees, as the Store Supervisors are in charge of their hiring and discipline. See *St. Luke's Health System, Inc.*, 340 NLRB No. 139 (2003), slip op. at 3-4; *Food Marts, Inc.*, 200 NLRB at 19; *McDonalds*, 192 NLRB 878 (1971).

The record also establishes regular and substantial interchange among the employees in Store 314 and the other stores in Farreny's Supervisory Group. Thus, there were 107 instances of temporary transfers in or out of Store 314 in a recent 17-month period, an average of more than six occasions per month, although only about 14 employees are employed at the store at a time. Other stores in the Supervisory Group and Area have more transfers. Thus, in Farreny's 13-store Supervisory Group, there were about 11 temporary transfers per month per store, while in Area 2, which has 88 stores, there were about 11.5 temporary transfers per month per store. Based on witness testimony, it appears that there is a regular practice of employees working extra hours at other stores to earn extra money or to cover for shortages of employees at those stores, and these temporary transfers are easily facilitated by the close proximity of the Employer's stores to each other. In this regard, there are at least 12 other stores within four miles of Store 314. A significant but uncertain percentage of temporary transfers involved the opening of new stores, coverage for special events, promotions, and transfers initiated by employees, and the Board accords less weight to these types of transfers. See *Red Lobster*, 300 NLRB 908, 910 (1990); *AVI Food Systems, Inc.*, 328 NLRB 426, 430 (1999). However, regardless of the reasons, the extensive, regular temporary transfers involving employees from Store 314 clearly constitutes substantial interchange. See *Budget Rent-A-Car Systems, Inc.*, 337 NLRB 884 (2002) (temporary transfers twice a month and six permanent transfers within a year, in a petitioned-for unit of 15 employees); *Lawson Milk Co., Division, Consolidated Foods Corp.*, 213 NLRB 360, 361, fn. 8 (1974) (Board finds significant interchange where there were temporary transfers once a month, although the majority of employees were not involved in temporary transfers.); *McDonald's*, supra (temporary transfers, on average, twice a month, in addition to transfers for store openings, in a group of 245 employees); *Purity Supreme, Inc.*, 197 NLRB 915 (1972).

Permanent transfers of employees are also fairly common. Thus, there were six permanent transfers of unit employees to or from Store 314 during the 17-month period. The record does not indicate the reasons for these transfers, although permanent transfers of unit employees are generally requested by the employees. While the Board normally accords less

weight to evidence of permanent transfers than voluntary transfers,²⁰ in *St. Luke's Health System*, supra, evidence of permanent transfers, along with evidence of temporary transfers, was found to be a major factor establishing functional integration among several health care clinics. In the circumstances of the instant case, it is clear that the Employer's employees regularly move to and from Store 314 and often do not form permanent connections to any one store. I therefore find that the frequency of temporary transfers from Store 314 to other stores, coupled with evidence of six permanent transfers in a store with only 14 employees, demonstrates that there is significant interchange between stores. *Budget Rent-A-Car Systems, Inc.*, supra; *Purity Supreme Inc.*, supra.

In sum, the record shows regular involvement of the Store Supervisor in labor relations and personnel decisions, substantial employee interchange, strong centralized administration, common skills and terms and conditions of employment for all of the Employer's employees, and extremely close proximity of the stores to each other. In these circumstances, I find that a unit limited to employees in Store 314 is not an appropriate unit. *Budget Rent-A-Car Systems, Inc.*, supra; *Lawson Milk Company Division, Consolidated Foods Corp.*, supra.²¹

I further find that a unit limited to employees in Farreny's Supervisory Group is the smallest appropriate unit. Thus, although the Area-wide unit proposed by the Employer may also be appropriate, employees throughout Area 2 do not share such a strong community of interest as to preclude a finding that the smaller unit is appropriate. There is no extensive contact or interchange between employees in Store 314 and employees outside of Farreny's Supervisory Group; rather, virtually all of the transfers involving this store occurred within the Group. Farreny regularly visits all of the stores in her group and is far more personally involved in labor relations matters than Area Manager Burt, who is responsible for 88 stores. The fact that employees at the Employer's other facilities in Area 2, and indeed across the entire chain of stores, are subject to the same labor relations and personnel policies and have uniform skills, duties, and working conditions does not detract from the community-of-interest among employees in Farreny's Supervisory Group. Finally, the distance between some stores in Area 2 militates against an area-wide unit. Area 2 covers 88 stores in a 50-mile section of north and central New Jersey. By contrast, stores in Farreny's Supervisory Group are located within three

²⁰ *Deaconess Medical Center*, 314 NLRB 677, fn. 1 (1994).

²¹ In most of the cases cited by the Petitioner in which single store units were found appropriate, there was less employee interchange, and the local manager had greater autonomy. See *AVI Foodsystems, Inc.*, supra (local manager had authority to determine the level of staffing, resolve grievances, and recommend promotions, transfers, and wage increases, and there were very few transfers); *Red Lobster*, supra (restaurant manager had authority to initiate wage increases, address and resolve grievances, and made the overwhelming majority of the hiring decisions; the restaurants were an average of seven and as much as 22 miles apart; and there were only 11 permanent and 27 temporary transfers in a year in a petitioned-for unit of 185 employees); *Bud's Thrift-T Wise*, 236 NLRB 1203 (1978) (store manager had authority to discharge or effectively recommend discharge of all employees, and evaluate employees for purposes of wage increases, and there were only three permanent and four temporary transfers in a proposed unit of 45 employees); *J&L Plate, Inc.*, supra (local management had authority to hire and discharge employees, and there were 20 temporary and 21 permanent transfers over a three to four-year period in a proposed unit of 45 to 55 employees); *Emporium-Capwell, a Division of Carter Hawley Hale Stores Inc.*, 273 NLRB 621 (1984) (store manager had authority to address employee grievances, the stores were much farther apart than in this case, and there were no temporary transfers and 35 permanent transfers over a 20-year period).

or four miles of each other. Such geographic proximity supports a finding that the Supervisory Group is an appropriate unit for collective bargaining. *St. Luke's Health System*, supra; *Lawson Milk Co.*, supra; *Food Marts, Inc.*, supra. In short, the record establishes that a Supervisory Group is an appropriate unit based on the substantial autonomy vested in Store Supervisor Farreny regarding labor relations, her routine involvement in personnel matters, the frequent temporary and permanent transfers among stores within her Group, and the geographic proximity of the stores within the Group. *St. Luke's Health System*, supra; *Budget Rent-A-Car Systems, Inc.*, supra; *V.I.M. Jeans*, supra (1984); *Lawson Milk Company Division*, supra; *McDonald's*, supra. I therefore find this unit to be appropriate.²²

V. SUPERVISORY STATUS OF THE ASSISTANT MANAGERS

A. The Applicable Legal Standards

Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712 (2001); *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994). The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, supra. Any lack of evidence in the record is construed against the party asserting supervisory status. *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999).

The statutory criteria for supervisory status set forth in Section 2(11) are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. The authority effectively to recommend an action means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation ultimately is followed. *Children's Farm Home*, 324 NLRB 61 (1997); *Hawaiian Telephone Co.*, 186 NLRB 1 (1970). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), enfd. 961 F.2d 1578 (6th Cir. 1992). Evidence of the exercise of secondary indicia of supervisory authority is not sufficient to establish supervisory status in the absence of primary indicia of supervisory authority. *First Western Building Services*, 309 NLRB 591, 603 (1992).

²² The record shows that the boundaries of both the Supervisory Groups and the Areas change every two or three years. Accordingly, this factor does not favor one unit more than the other, and I do not find that the Supervisory Group is insufficiently stable to form a cohesive, coherent unit. See *Laboratory Corporation of America Holdings*, 341 NLRB No. 140 (2004); *Burlington Food Store, Inc.*, 235 NLRB 205, 206 (1978).

B. The Petitioner's Contentions

The Petitioner contends that the AMs assign and responsibly direct the work of other employees and effectively recommend hiring, discipline, and termination. The Petitioner further asserts that the AMs possess secondary indicia of supervisory authority because they are paid more and receive better benefits than other employees, they may be required to transfer between stores, they attend management meetings, and they receive special training. The Petitioner asserts that even if not supervisors, they should be excluded from the unit on community of interest grounds.

C. Facts

Work Assignment and Direction

AMs generally spend about 80 to 90 per cent of their time performing the same types of duties as CSAs, i.e., serving customers, stocking the shelves, and operating the cash register. The AM job description states that the AM supervises a shift, supervises the CSAs, and ensures employees' compliance with established procedures and policies. While the AM may assign work to other employees, such assignments are generally routine, based on the AM's knowledge of employees' obvious experience and skills. For example, an AM would not ask an apprentice to slice delicatessen products because apprentices have not been trained to perform this function.

The AM may prepare employee work schedules, although this is normally the responsibility of the Store Manager. AMs do not have the authority to deny requests for time off or cancel employee shifts. The AM can authorize overtime as needed to ensure that customer service needs are met, without having to seek approval from a Store Manager or Store Supervisor.

Hiring and Discipline

There is no evidence that the AMs have any role in hiring or discharging employees. Although Burt testified that AMs have recommended employee discipline and those recommendations were generally followed, the record contains no evidence of any specific situation in which an AM ever recommended discipline. Moreover, Store Managers are required to investigate all recommendations for discipline for part-time employees, and Store Supervisors investigate all disciplinary recommendations for full-time employees. The AM may send an employee home for an egregious violation of the Employer's work rules, but this occurs infrequently.

Substitution for Store Managers

The AM is responsible for the store when the Store Manager is absent, including vacations, which generally occur one or two weeks per year. During such absences, the AM may make changes to the store schedule. However, the AM does not perform all of the Store Manager's functions. For example, the AM does not create or analyze such reports.

Miscellaneous

The AM is paid a higher hourly wage rate than all other employees and receives a monthly bonus tied to hours worked and store profitability. Their annual compensation is about \$33,000 a year, compared to \$58,000 for Store Managers. The AMs have more favorable vacation and paid-time-off benefits than other employees in the proposed unit, and they attend some management meetings with Store Managers and Store Supervisors. The AM also receives special training in subjects such as time management, inventory management, and delegation of work.

Along with the Store Manager, the AM has keys to the store and the store safe and may open and close the store if it is open less than 24 hours. The AM is responsible for cash management on his or her shift and receipt of deliveries of products.

D. Analysis

I find that the Petitioner has not met its burden to establish that the Employer's AMs are supervisors within the meaning of the Act. The AMs spend the vast majority of their time performing the same work as the other employees in the store. Although they have the authority to recommend discipline, there is no evidence that they have ever done so. In any case, higher-level managers would independently investigate their recommendations, and the Board has held that the power to effectively recommend means that the action was taken with no independent investigation by superiors. *The Kroger Co.*, 342 NLRB No. 20, slip op. p. 10 (2004). Further, in the absence of any evidence that such recommendations automatically lead to any further discipline or adverse action against an employee, the authority to issue discipline does not establish supervisory status. *The Ohio Masonic Home*, 295 NLRB 390, 393 (1989). The fact that they can send employees home for flagrant violations of company rules also does not confer supervisory status on the AMs. *Michigan Masonic Home*, 332 NLRB 1409, 1411 fn. 5 (2000).

Additionally, the record does not show that AMs exercise independent judgment in assigning or responsibly directing the work of employees. Rather, AMs make routine work assignments based on the obvious skill levels of the employees. There is no evidence that any of the jobs assigned require any particular skills, nor that the abilities of any of the employees who perform the jobs differ substantially, such that selecting a particular employee for a task would require independent judgment. *Franklin Home Health Agency*, 337 NLRB 826 (2002); *Bozeman Deaconess Foundation*, 322 NLRB 1107 (1997).

The fact that AMs are sometimes asked to prepare work schedules does not confer supervisory status absent evidence, lacking here, that independent judgment must be exercised in the process. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). There is no evidence indicating whether or how frequently AMs authorize overtime or the process that AMs use in making these decisions. Scheduling of overtime within relatively fixed management parameters does not require independent judgment and does not establish supervisory status. *Dico Tire Inc.*, 330 NLRB 1252 (2000). Moreover, asking employees to perform overtime voluntarily does not entail the exercise of independent judgment. *Ryder Truck Rental*, 326 NLRB 1386, 1387 (1998); *Providence Hospital*, 320 NLRB 717, 732 (1996).

The job description's statement that AMs "supervise" CSAs is also not a reliable indicator of supervisory status. A statement in a job description that an employee is responsible for the direct supervision of other employees is insufficient, in and of itself, to establish supervisory status. *Franklin Home Health Agency*, supra at 829 (2002); *Crittenton Hospital*, 328 NLRB 879 (1999).

With respect to the Petitioner's claim that the AMs should be viewed as supervisors within the meaning of the Act because of their substitution for Store Managers, the Board has held that the appropriate test is whether the substitute supervisors spend a regular and substantial portion of their working time performing supervisory tasks. *Aladdin Hotel*, 270 NLRB 838, 840 (1984). The record establishes that AMs are in charge of the store only during the Store Managers' absences, including when they are on vacation, which falls short of a regular and substantial portion of their time. The Board has held that irregular or sporadic substitution for supervisors, such as during vacations and at other unscheduled times, does not confer supervisory status. *Hexacomb Corp.*, 313 NLRB 983, 984 (1994); *Gaines Electric Co.*, 309 NLRB at 1078, and the record does not establish that the AMs fill in for Store Managers on a regular and substantial basis. *Carlisle Engineered Products, Inc.*, 330 NLRB 1359, 1360-1361 (2000).

Additionally, the fact that AMs have a better compensation package than other employees is, at best, a secondary indicium of supervisory status and cannot transform them into statutory supervisors without evidence that they possess at least one of the statutory indicia. In the absence of primary indicia as enumerated in Section 2(11), the AMs' secondary indicia, which also include extra training, mandatory transfers, attendance at management meetings, possession of keys to the facility, and a title connoting management status, are secondary indicia insufficient to establish supervisory status. *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 fn. 2 (1996). I also do not find that these differences destroy their community of interest with other employees, in view of the fact that AMs work with them in the same stores, spend 80 to 90 percent of their time performing the same types of duties, and are commonly supervised by the Store Managers.

I therefore find that the Petitioner has not carried its burden of proving that the AMs are supervisors within the meaning of the Act and that the AMs have a community of interest with other employees and should be included in the unit.

VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part-time Assistant Managers, Customer Service Leaders, Customer Service Associates, Food Service Leaders, Food Service Associates, Fuel Team Leaders, Fuel Team Associates, Facility Maintenance Leaders, Facility Maintenance Associates, Shift Leaders, Coffee Hosts/Hostesses, and Apprentices, employed at the stores in the Supervisory Group in Area 2, New Jersey currently supervised by Stacey Farreny, excluding all other employees, Store Managers, Managers-in-Training, clerical employees, guards and supervisors as defined in the Act.²³

If the Petitioner seeks to proceed to an election in the unit set forth above, its showing of interest is inadequate because, as a result of this Decision, the Petitioner needs a showing of interest for the entire 13 store Supervisory Group, not only for Store 314. Accordingly, the Petitioner should advise the undersigned Regional Director as to whether or not it wishes to proceed to an election in the unit found appropriate, and the Petitioner has 14 days from the issuance of this Decision to augment its showing of interest, if necessary. See *NLRB Casehandling Manual (Part Two), Representation Proceedings*, Sec. 11031.2. If the Petitioner fails to submit an adequate showing of interest within this period, or to withdraw the petition, the petition will be dismissed without further order. The Direction of Election set forth below is thus conditioned on the Petitioner having an adequate showing of interest. See *Alamo Rent-A-Car*, 330 NLRB 897 (2000). In the event that a request for review is filed with respect to this Decision, the foregoing requirement will be suspended until the Board rules on the request for review.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by the **United Food and Commercial Workers Union, AFL-CIO, Local 1360**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

²³ As noted above, the Employer's exhibits are inconsistent as to which stores are included in Farreny's Supervisory Group. Accordingly, this Direction of Election shall not set forth the store numbers.

A. Eligible Voters

The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). These lists may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election only after I shall have determined an adequate showing of interest among the employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **September 14, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (215) 597-7658. Since the list will be made available to all parties to the election, please furnish a total of two (2) copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EDT on **September 21, 2004**.

Signed: September 7, 2004

at Philadelphia, PA

/s/ [Dorothy L. Moore-Duncan]
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four